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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1325~~ 145

EDWARD T. ROEHNER,

Petitioner,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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JAMES H. HALPIN,
Of Counsel.

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Question Presented

Is the order of the New York Supreme Court, Appellate Division, Second Department, affirming the order of the Supreme Court, Kings County, granting respondents' motion to change the venue of this action from Kings County to New York County a final judgment or decree reviewable by this Court under Title 28 USC § 1257?

Statement of the Case

Petitioner seeks review of the order of the New York Supreme Court, Appellate Division, Second Department, which affirmed the order of the Supreme Court, Kings

County, granting respondents' motion to change the venue of this action from Kings County to New York County.

Petitioner brought this action in January 1965 for damages claimed to have been suffered by reason of his wrongful expulsion from respondent, The Association of the Bar of the City of New York ("Association") and for reinstatement as a member of the Association. Respondents moved in the Supreme Court, Kings County, for an order changing the venue of the action from Kings County to New York County on the ground that Kings County was an improper county under New York Civil Practice Law and Rules ("CPLR") 503(a) since none of the parties resided in Kings County at the time this action was brought. Respondents' motion was granted and an order entered directing a change of venue (App. 28).* On appeal to the Appellate Division, Second Department, the order was affirmed (App. 25-27). Thereafter leave to appeal to the Court of Appeals was denied by the Appellate Division and by the Court of Appeals (App. 21-24). The latter court denied petitioner's motion on the ground that "the order sought to be appealed from does not finally determine the action within the meaning of the Constitution" of the State of New York (App. 21-22).

Argument

Under Title 28 USC § 1257, this Court may review only "[f]inal judgments or decrees" of state courts, that is, judgments or decrees which effectively determine the liti-

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* "App." refers to the Appendices to the Petitioner's Petition for a Writ of Certiorari; the numbers refer to the relevant pages in the Appendices to the Petition.

gation. See, e.g., *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co., Inc.*, 344 U. S. 178 (1952); *Market Street Ry. Co.* v. *Railroad Comm'n*, 324 U. S. 548, 551 (1944).

The order of the Appellate Division, Second Department, which petitioner seeks to have reviewed does not determine this litigation for it only directs the transfer of this action from Kings County to New York County. As indicated by the New York Court of Appeals, it is not a final order, and no argument can make it so. Moreover, this Court has specifically held that the judgment of a state court granting a motion for change of venue is not a final judgment. *Cincinnati Street Ry. Co.* v. *Snell*, 179 U. S. 395 (1900).

Not only has there been no adjudication on the merits, but petitioner, if he is so advised, may still move in New York County under CPLR 510 for an order directing transfer of this action to another county on the ground that there is reason to believe that an impartial trial cannot be had in New York County. Indeed, the decision of the Supreme Court, Kings County (App. 28), indicates that the issue petitioner seeks to present, namely, that he would not receive an impartial trial in New York County was not considered by that court because, under New York law, the proper court to determine that issue was the Supreme Court, New York County. Thus, any consideration by this Court of petitioner's argument would be premature in view of the fact that the issue of a fair trial has not yet been decided by the New York courts and can now be raised by petitioner in the Supreme Court, New York County.

Respondents also submit that petitioner has made no showing that this is a case involving "special and important reasons" for granting a writ of certiorari, as required by Supreme Court Rule 19. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74 (1955).

Conclusion

The order sought to be reviewed is not final; accordingly the petition for a writ of certiorari should be denied.

June 9, 1966.

Respectfully submitted,

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JAMES H. HALPIN,
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APPENDIX

Title 28, United States Code

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

New York Civil Practice Law and Rules

§ 503. Venue based on residence

(a) **Generally.** Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.

§ 510. Grounds for change of place of trial

The court, upon motion, may change the place of trial of an action where:

1. the county designated for that purpose is not a proper county; or

2. there is reason to believe that an impartial trial cannot be had in the proper county; or

3. the convenience of material witnesses and the ends of justice will be promoted by the change.